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The next generation of Chinese investment treaties: A balanced paradigm in an era of change*

by
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The fortieth anniversary of China's reform and opening-up policy coincides with substantial changes in China's foreign investment legal regime. The history of China's investment treaties began in 1982, when the country entered into its first bilateral investment treaty (BIT), and was marked by two other key dates: the 1998 entry into force of the China-Barbados BIT, in which China accepted full ICSID jurisdiction, and China's 2013 acceptance of pre-establishment national treatment and a negative list approach to exceptions. In this era of change, China's new generation of investment treaties features two new characteristics: they are based on a balanced paradigm, and they are becoming more influential at the domestic level.

China has become the world's third-largest home country, and it remains the second largest host country. Accordingly, China's government seeks to balance the protection of foreign investment with state sovereignty. China can be expected to emphasize outward FDI protection more, especially in implementing the Belt and Road initiative. Meanwhile, it is essential for China to maintain its FDI regulatory space. Unlike most of China's BITs concluded in the 1990s, exceptions are clarified in the 2012 China-Japan-Korea investment agreement and the 2012 China-Canada BIT regarding security, taxation and prudential measures. As a major capital exporter, more categories of exceptions, such as cybersecurity, are likely to be included in the next generation of Chinese investment treaties.

Beyond that, Chinese investment treaties are increasingly influencing China's domestic legislation. For example, following the 2013 agreement with the US on pre-establishment national treatment and a negative list approach, China's new foreign investment law, which was drafted in 2015 and approved in 2019,[1] reflects these changes. Also, a nationally unified negative list system was implemented in 2018. Therefore, the agreement reached with the US during the BIT negotiations with China has resulted in a national reform aimed at ending the era of sole postestablishment national treatment in China's domestic foreign investment laws. This change in national legislation entitles all foreign investors to pre-establishment national treatment. Other domestic laws have also been adapted, e.g., China's 2015 national security law and its 2017 network security law, to clarify exceptions in Chinese BITs.

Furthermore, with the reform of China's foreign investment law, some BITs—especially those concluded in the 1980s and 1990s, such as the 1985 China-Kazakhstan BIT when China focused on expanding its opening-up policy—are likely to be updated. And other BITs, such as the 1986 China-United Kingdom BIT, may be replaced by future FTAs.

The loose connection between BITs and domestic legislation, the fragmentation of the latter and the adoption of a highly flexible negotiation strategy to attract FDI as a not-so-typical capital-exporter, all contributed to the inconsistency of Chinese BITs entered into before 2016.[2] The next generation of Chinese BITs should reflect that China has become a net capital-exporting country. This may promote greater coherence among Chinese BITs, operationalizing also the balanced paradigm; but it may slow down Sino-foreign BIT negotiations, especially with big powers that insist on their own models.

Remaining difficulties involve the definition of investors, the content of exception clauses and the attitudes toward information technologies.

The issues raised by China's state-owned enterprises (SOEs) in arbitration reflect a defect of earlier Chinese BITs in defining investors. For example, in the *Beijing Urban Construction Group v. Yemen* case, the tribunal—in determining whether it has jurisdiction over the dispute under the China-Yemen BIT—held that the wholly state-owned entity BUCG was a commercial contractor rather than an agent of the Chinese government.[3] In the absence of a common definition of SOEs, future Chinese BITs should explicitly include SOEs in the definition of investors, as in the recent China-Korea and China-Mexico BITs.

Also, different interpretations of exceptions in relation to host countries' foreign investment regulations (e.g., the definition of public security) will pose crucial challenges in the China-US BIT and China-EU BIT negotiations. The South-North conflict becomes more evident through the use of exception clauses. For example, the US aims at enabling cross-border data flows,[4] while China emphasizes industrial security and customers' data.

The new generation of Chinese investment treaties is embracing a balanced paradigm to enhance investment protection and defend regulatory sovereignty. The exact balance that will be found in each treaty will depend on the specific circumstances and interests of the governments with which China will be negotiating its investment treaties.

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[1] The National People's Congress of the People's Republic of China, Official report on the 2018 legislation plan of China's Standing Committee of the National People's Congress, http://www.npc.gov.cn/npc/xinwen/2018-04/27/content_2053820.htm?from=timeline&isappinstalled=0.

[2] Axel Berger, "Hesitant embrace: China's recent approach to international investment rule-making," *The Journal of World Investment & Trade*, vol. 16 (2016), pp. 843-868.

[3] Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, *Decision on jurisdiction* (May 31, 2017), pp. 10-13.

[4] See, e.g., United States Trade Representative, *The Digital 2 Dozen* (2016).

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